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SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1798

RICHARD CARPENTER and
STEPHEN BORDERS - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY AND APPENDIX

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional and Statutory Provisions Involved 2– 3

Statement of the Case 3– 5

Reason for Granting the Writ 5–17

Conclusion 17–18

Appendix 19–42

Appendix A (Opinion of the Court of Appeals of Kentucky) 19–23

Appendix B (Opinion of the Court of Appeals of Kentucky Reissued) 24–32

Appendix C (Memorandum Opinion Per Curiam Rendered by Supreme Court of Kentucky) 33–37

Appendix D (Opinion of the Supreme Court of Kentucky) 38–41

Appendix E (Order of Supreme Court of Kentucky Denying Petition for Rehearing) 42

TABLE OF AUTHORITIES

Constitutional Provisions:

PAGE

United States Constitution, Fourteenth Amendment, Article I, section 10 ..... 2– 3

Statutes:

Federal Statute: 28 U.S.C. §1257(3) 2

Cases:

Bouie v. *Columbia,* 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1963) 15

Bradley v. *Richmond School Board,* 416 U. S. 696, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974) 14

Hormel v. *Helvering,* 312 U. S. 552, 85 L. Ed. 1037, (1940) 16

In re Winship, 397 U. S. 358 (1970) 5–6, 7

Issac v. *Engle,* ____ F. 2d ____, No. 78-3488 (6th Cir. Feb. 8, 1980) 11, 12

Jackson v. *Virginia,* ____ U. S. ____, 61 L. Ed. 2d 560 (1979) 5, 6, 7, 16

Kimbrough v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) 8, 9, 12, 14, 16, 17

Mitchell v. *W. T. Grant Company,* 416 U. S. 600, 40 L. Ed. 2d 406, 95 S. Ct. 1895 (1974) 17

O'Connor v. *Ohio,* 385 U. S. 92, 17 L. Ed. 2d 189, 87 S. Ct. 252 (1966) 11

Thompson v. *Louisville,* 362 U. S. 199 (1960) 6

Thompson v. *State of Utah,* 18 S. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061 (1898) 15

SUPREME COURT OF THE UNITED STATES

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No. _____

RICHARD CARPENTER and
STEPHEN BORDERS - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioners, RICHARD CARPENTER and STEPHEN BORDERS, respectfully pray that a Writ of Certiorari issue to review the Order and Opinion of the Supreme Court of Kentucky entered in this proceeding on November 20, 1979.

OPINIONS BELOW

The Opinion of the Supreme Court of Kentucky is reported at 592 S. W. 2d 132 (1980). A Petition for Rehearing was filed and the Supreme Court of Kentucky was ordered to respond. The Order of the Supreme Court of Kentucky overruling Petitioners Petition for Rehearing was entered on February 12, 1980. (Appendix E, p. 42).

JURISDICTION

The Order of the Supreme Court of Kentucky was entered on November 20, 1979, and a timely Petition for Rehearing was denied by Order of the Supreme Court of Kentucky on February 12, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Is it a violation of a defendant's right to due process of law for a court to hold that there is no substantial evidence to support a conviction, but uphold the conviction based on the retroactive application of a substantial change of a state procedural rule.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> . . . [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

Article I section 10 of the Constitution of the United States provides in pertinent part:

> [cl. 1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin

a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto Law,* or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

This case was tried by a jury in the Jefferson Circuit Court on June 28, 29, 30 and July 1, 2, 1976. There were three Defendants in the within action: BLAIR; BORDERS; and CARPENTER. This Writ of Certiorari is brought by only CARPENTER and BORDERS. The Petitioners were charged in a twelve count Indictment with having fired shots into automobiles and business places on the west side of Louisville, injuring persons and property (Transcript of Record, hereinafter designated as T.R., p. 2). After over fourteen hours of deliberation, the jury found the Petitioners guilty of two counts of wanton endangerment in the first degree and two counts of criminal mischief in the third degree and fixed their sentence at one year in the penitentiary.[1] (Transcript of Evidence, hereinafter designated as T.E., pp. 812-813).

The Petitioners perfected a timely appeal to the Court of Appeals of Kentucky. On the 10th day of February, 1978, that Court rendered its opinion which reversed the conviction and ordered that a new trial be granted with directions that if the evidence for the Commonwealth is substantially the same that a directed verdict in favor of the Petitioners be entered. (Appendix A, pp. 19-23).

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[1]By statute, K.R.S. 532.060, the Jury Fixes the Punishment in Kentucky.

On June 30, 1978, the Court of Appeals withdrew its original opinion entered on February 10, 1978, and issued a new opinion. The Court held that where all the evidence is *circumstantial,* the lack of conclusiveness of the test leaves the Court with no alternative but to reverse the conviction of the Petitioners. (Appendix B, pp. 24-32).

On November 14, 1978, the Supreme Court of Kentucky granted the Commonwealth's Motion for Discretionary Review to review the June 30, 1978, decision of the Court of Appeals.

In a Memorandum Opinion Per Curiam rendered on June 12, 1979, the Kentucky Supreme Court affirmed the Court of Appeals' opinion reversing the conviction of Petitioners, CARPENTER and BORDERS. That Court held that the evidence was insufficient to convict the Petitioners. *In fact, the Court stated that there was no relevant evidence in the record before them that linked either of the Petitioners to the charged offenses.* (Appendix C, p. 36).

On June 28, 1979, the Commonwealth filed a Petition for Rehearing in the Kentucky Supreme Court. The Supreme Court of Kentucky granted the Commonwealth's Petition for Rehearing and issued a new opinion rendered on November 20, 1979, which completely reversed the decision of the Court of Appeals and upheld the Petitioners' convictions. The Court reasoned that since the Petitioners had failed to move for a directed verdict at the close of all the evidence, the issue of the sufficiency of the evidence was, there-

fore, not preserved for appellate review. (Appendix D, p. 41).

The Petitioners then filed a timely Petition for Rehearing which was denied on February 12, 1980. Petitioners filed a Motion to Recall the Mandate pending consideration by this Court of the within Petition. Said motion was sustained on March 5, 1980.

REASON FOR GRANTING THE WRIT

1. It Is a Fundamental Violation of the Due Process Clause for the Supreme Court of Kentucky to Hold That There Is No Substantial Evidence of Guilt of These Petitioners and Yet Sustain Their Conviction for Any Reason, Let Alone the Retroactive Application of a Substantial Change in a Procedural Rule.

On June 28, 1979, this Court announced a new standard for acquittal based upon insufficiency of the evidence. The new standard dictates that a defendant cannot now be convicted of a crime where no rational trier of fact could find proof of guilt beyond a reasonable doubt.

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, *Jackson* v. *Virginia, supra,* —— U. S. at ——, 61 L. Ed. 2d 560, 573 (June 28, 1979).

In articulating this new standard for acquittal based on insufficiency of evidence, this Court relied upon the familiar constitutional standard of *In re Winship,* 397

U. S. 358 (1970), which stated that no person may be convicted except upon proof beyond a reasonable doubt as to every element of the offense charged.

> In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson* v. *Virginia,* —— U. S. ——, 61 L. Ed. 2d 560, 571 (June 28, 1979).

In fact, the Supreme Court went so far as to state that a reasonable doubt means "the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson, supra, Id,* at p. 571.

Prior to *Jackson,* the standard for acquittal based upon insufficient evidence was the limited standard of *Thompson* v. *Louisville,* 362 U. S. 199 (1960). In *Thompson,* this Court held that due process protects against a wholly arbitrary deprivation of liberty and that a conviction must be reversed only where the record contains *no* evidence of guilt.

> [W]e find no evidence whatever in the record to support these convictions. "Just as a conviction upon a charge not made would be sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt. *Thompson* v. *Louisville, supra,* 362 U. S. at 206.

The "no evidence" standard has now been held to be simply too inadequate to protect against the misapplication of the constitutional standard of reasonable doubt and is, therefore, no longer applicable.

> That the Thompson "no evidence" rule is simply inadequate to protect against misapplication of the constitutional standard of reasonable doubt is readily apparent. "A mere modicum of evidence may satisfy a 'no evidence' standard." . . . Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence . . . —could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. The Thompson doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored. *Jackson* v. *Virginia, supra,* —— U. S. ——, 61 L. Ed. 2d at 574.

This Court's reasoning makes it clear that the *Winship* standard of reasonable doubt is now the standard for acquittal guaranteed by the due process clause. *Accord, Moore* v. *Duckworth,* —— U. S. ——, 61 L. Ed. 2d 865 (July 2, 1979); *Leonard M.* v. *California,* —— U. S. ——, 61 L. Ed. 2d 878 (July 2, 1979); and *Pilon* v. *Bordenkircher,* —— U. S. ——, 62 L. Ed. 2d 1 (October 9, 1979).

Both the Court of Appeals of Kentucky and the Supreme Court of Kentucky have agreed that there is

no relevant evidence connecting Petitioners with any of the alleged offenses. The Court of Appeals of Kentucky in its opinion rendered on June 30, 1978, reversed the decision of the trial court on the ground that there was *insufficient evidence* to sustain the Petitioners' conviction (Appendix B, p. 27). Likewise, the Supreme Court of Kentucky in its opinion of June 12, 1979, affirmed the opinion of the Court of Appeals and agreed that there was "no relevant evidence linking CARPENTER and BORDERS to the charged offenses." (Appendix C, p. 36).

However, the Supreme Court of Kentucky in its opinion dated November 20, 1979, opted to set aside its opinion of June 12, 1979, and ignore the constitutional mandate of the new standard for conviction established in *Jackson.* The Court upheld the Petitioner's convictions because of an alleged procedural error committed at trial by counsel for Petitioners in not making a Motion for A Directed Verdict at the close of all the evidence, even though its earlier opinion acknowledged that there was *no* relevant evidence connecting Petitioners with any of the charged offenses. (Appendix D, p. 41). The Supreme Court of Kentucky based its reissued opinion on the holding of *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977). That case was not decided until well after the Petitioners' trial and held that in order to preserve the issue of sufficiency of the evidence it is necessary to make a Motion for a Directed Verdict at the close of all the evidence.

It should be noted at this point that *Kimbrough's* procedural rule represented a clear departure from the

customary procedure for preserving the question of the sufficiency of the evidence that was in effect at the time of Petitioners' trial. In writing the opinion of the Supreme Court of Kentucky rendered on November 20, 1979, Justice Clayton noted that prior to *Kimbrough* the state of the law on that issue was uncertain, and that the decision in *Kimbrough* was a *clarification* of the procedural rule for preserving the sufficiency of the evidence question. [Appendix D, p. 40.] Hence, it was not until April 1, 1977, nine months subsequent to the Petitioners' trial, that a definitive statement on this particular point of criminal procedure was established by the Supreme Court of Kentucky. In short, it was not until well after the Petitioners' trial that attorneys were given notice of the new manner in which the sufficiency of the evidence issue could be preserved for Appellate review.

The law in effect prior to *Kimbrough, at the time of Petitioners' trial,* required only that a Motion for A Directed Verdict of acquittal be made at the close of the Commonwealth's case in order to preserve the sufficiency of the evidence issue. In a separate opinion written by Chief Judge Martin concurring with the decision rendered by the Kentucky Court of Appeals on February 10, 1978, it was noted, and properly so, that *Kimbrough* represented a clear departure from prior case law in the Commonwealth of Kentucky. Judge Martin also correctly pointed out that the question of the sufficiency of the evidence could have been preserved at the time of Petitioners' trial by a Motion for a Directed Verdict at the close of the Common-

wealth's case or at the close of all the evidence, or even in a Motion for a New Trial.

> . . . a question of sufficiency of the evidence could have been preserved either by motion for a directed verdict at the close of the Commonwealth's case, or at the close of all the evidence, or even in a motion for a new trial. See *Crain* v. *Commonwealth,* Ky., 484 S. W. 2d 839, 842 (1972): Civil Rule 61.02, made applicable to criminal cases pursuant to Criminal Rule 13.04: *Stone* v. *Commonwealth,* Ky., 456 S. W. 2d 43, 44 (1970). [Appendix B, p. 30.]

Counsel for Petitioners did, in fact, adhere to the precise standards available for preserving the issue of the sufficiency of the evidence as enumerated above by Chief Judge Martin and by the Kentucky Court of Appeals in *Crain.*[2] Counsel first moved for a directed verdict at the close of the Commonwealth's case and then raised the question of the sufficiency of the evidence in their motion for a new trial. In short, counsel had complied with all of the mandatory procedures for preserving the sufficiency of the evidence question that were in effect at the time of Petitioners' trial. Yet, Petitioners have been penalized and made to suffer a manifest injustice as a result of following the very standards prescribed by the Courts of Kentucky at the time of their trial for preserving the sufficiency of the evidence question. Said penalty is contrary to the basic

[2]Until January 1, 1976, Kentucky had no intermediate appellate court and its highest court was the Court of Appeals of Kentucky. In 1974 Chapter 84 of the 1974 Acts of the General Assembly was adopted creating the Kentucky Supreme Court.

concept of fundamental fairness and Due Process of Law and, therefore, cannot constitutionally stand.

In a most recent case, the United States Court of Appeals for the Sixth Circuit has relied on the reasoning employed by this Court in *O'Conner* v. *Ohio,* 385 U. S. 92, 17 L. Ed. 2d 189, 87 S. Ct. 252 (1966) and held that when a retroactive application of an opinion of the court substantially changes the law, due process mandates that a defendant cannot be charged with anticipating the new change in the law. *Isaac* v. *Engle,* —— F. 2d ——, No. 78-3488 (6th Cir. Feb. 8, 1980).

The facts of *Isaac* are strikingly analogous to the case at bar. In *Isaac,* the trial court instructed the jury that the defendant bore the burden of proving his affirmative defense by a preponderance of the evidence. This was the law at the time of trial and the defendant did not object. *Subsequently,* the Supreme Court of Ohio changed this standard and held that the defendant need only go forward with evidence sufficient to raise the defense. One year later that same court applied this new standard retroactively. The defendant sought Habeas Corpus relief and the Sixth Circuit, relying on this Court's opinion in *O'Connor, supra,* reversed the district court and held that the petitioner could not be denied Habeas relief, reasoning that the defendant should not have been charged with anticipating the future change in Ohio law that invalidated the standard that was used at his trial. That Court correctly pointed out that the defendant did not object to the standard used by the trial court because that was the only standard available to him at that time.

In essence, to require the defendant to object to the only standard available to him at trial would have been to require the doing of a vain act.

* * *

> . . . yet, in the case at bar every recognized authority on affirmative defenses in Ohio as well as dictum from the Ohio Supreme Court reinforced the propriety of the trial court's charge to the jury. Thus, existing law provided no basis for an objection to the court's jury instructions at the time of trial. *To require an objection in these circumstances would be to require the doing of a vain act.*
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> * * *
>
> *In O'Connor* v. *Ohio, the Supreme Court held that the failure to object at trial to a practice that Ohio had long allowed could not deprive the petitioner of his right to attack that practice in the state courts following its subsequent invalidation by the Supreme Court. The Court reasoned that defendants cannot be charged with anticipating future decisions invalidating past practices.* Though O'Connor involved the attempted assertion of a federal claim, we believe the logic of that decision to be equally persuasive in the context of the present case. [Emphasis Added.] *Isaac, supra, Id.* at p. 8.

As in *Isaac,* Petitioners, CARPENTER and BORDERS, should not have been charged with anticipating the future standard enunciated in *Kimbrough* for preserving the issue of the sufficiency of the evidence, since that decision substantially changed the standard in effect at the time of their trial. By upholding the

Petitioners' convictions the Supreme Court of Kentucky is, in effect, stating that Petitioners should have deviated from the only standard available at trial for preserving the sufficiency of the evidence issue. However, it is obvious that Petitioners would have been performing "a vain act" by deviating from the only standards available to them. Due Process of Law and fundamental fairness prohibits the State of Kentucky from penalizing the Petitioners for not performing acts which would have been in vain at the time of their trial. Petitioners should not be so deprived for their failure to deviate from the only standards available at their trial for preserving the sufficiency of the evidence issue.

This Court has long recognized the exception to the general rule that a court is bound to apply the law in effect at the time it renders its decision. That exception prevents an appellate court from applying a current law, if the law's application would bring about a manifest injustice on the parties. This Court has held that the appellate courts should struggle hard against a construction which would by a retrospective application create a manifest injustice to the parties.

> The Court in *Thorpe, however, observed that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision "had been made to prevent manifest injustice,"* citing *Greene* v. *United States,* 376 U. S. 149, 11 L. Ed. 2d 576, 84 S. Ct. 615 (1964). Although the precise category of cases to which this exception applies has not been clearly delineated,

> the Court in Schooner Peggy suggested that such injustice could result "in mere private cases between individuals," *and implored the courts to "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties."* [Emphasis Added] [Citation omitted.] *Bradley* v. *Richmond School Board,* 416 U. S. 696, 40 L. Ed. 2d 476, 491, 94 S. Ct. 2006 (1974).

It cannot be disputed that under our system of justice it would be a mainfest injustice to these Petitioners to sustain their conviction where there is admittedly no relevant or sufficient evidence to support the finding of guilt.

The retroactive application of *Kimbrough* is also violative of the Due Process Clause since it operates precisely like an ex post facto law. In a concurring opinion rendered by Chief Judge Martin of the Kentucky Court of Appeals, it was pointed out, and properly so, that since the *Kimbrough* rule affected the Petitioners' substantial rights, its application operated precisely like an ex post facto law which is prohibited by Article I, §10 of the Constitution of the United States. [Appendix B, p. 30.]

This Court has held that the legislature may prescribe different modes of procedure in its discretion, but in doing so it cannot lawfully dispense with any substantial rights that the existing law affords to the defendant. A statute which takes from the defendant a substantial right is said to be ex post facto in nature, and, therefore, prohibited by the United States Constitution.

> . . . "The legislature may abolish courts and create new ones, and *it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.*"
>
> * * *
>
> . . . But it was held in Hopt v. Utah above cited, *that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be ex post facto in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. Thompson* v. *State of Utah,* 18 S. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061 (1898). [Emphasis Added.]

If a state legislature is barred by the Ex Post Facto Clause from passing such a procedural law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

> If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. *Bouie* v. *Columbia,* 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1963).

From this Court's reasoning above it becomes very apparent that Judge Martin was correct in his con-

clusion that the *Kimbrough* rule operated like an Ex Post Facto law. The Supreme Court of Kentucky's judicial construction of the *Kimbrough* rule has resulted in the Petitioners' loss of a most substantial and fundamental right which is guaranteed by the Due Process Clause of the United States Constitution. That right dictates that no one can be made to suffer the onus of a criminal conviction which is based on no relevant evidence.

This Court has repeatedly held that the rules of procedure are devised to promote the ends of justice and *not* defeat them. Rules of procedure should *not* and *cannot* require the sacrifice of the rules of fundamental justice.

> *Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.* A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. *Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.* [Emphasis Added.] *Hormel* v. *Helvering,* 312 U. S. 552, 85 L. Ed. 1037, 1041 (1940).

Clearly, the ends of justice and fundamental fairness have been erroneously defeated by the Supreme Court of Kentucky's retroactive application of the rigid procedural rule enunciated in *Kimbrough.* Said application is contrary to the new constitutional mandate of *Jackson.* That new standard for acquittal allows for

no exceptions or deviations and dictates that a conviction cannot be upheld where there is insufficient evidence to establish guilt. Procedural rules must remain flexible in order to guard against the very injustice that these Petitioners have suffered. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Mitchell* v. *W. T. Grant Company,* 416 U. S. 600, 610, 40 L. Ed. 2d 406, 415, 95 S. Ct. 1895 (1974), quoting *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961); *Stanley* v. *Illinois,* 405 U. S. 645, 650 (1972). Petitioners pray that this Court grant the Writ of Certiorari, and negate the Supreme Court of Kentucky's inflexible application of the procedural rule established in *Kimbrough,* since that application defeats the ends of justice by forcing the Petitioners to suffer the onus of a criminal conviction when there has been absolutely no relevant evidence establishing their guilt.

CONCLUSION

The Supreme Court of Kentucky, in upholding these convictions, violated the Petitioners' right to substantive Due Process of Law as guaranteed by the Fourteenth Amendment of the United States Constitution. The Supreme Court of Kentucky has opted to retroactively apply an inflexible procedural rule and uphold a conviction, where it is conceded by all of the Appellate Courts of Kentucky that there is no relevant evidence connecting the Petitioners to any of the charged offenses. The Supreme Court of Kentucky's

judicial construction and retroactive application of the procedural rule established in *Kimbrough* has stripped the Petitioners of their fundamental right to be acquitted of an alleged crime where there has been no relevant evidence establishing guilt. For the reasons hereinabove stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

OPINION RENDERED: FEBRUARY 10, 1978
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

File No. CA-568-MR

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From the Jefferson Circuit Court
Honorable Charles Leibson, Special Judge
Action No. 156577

REVERSING AND REMANDING

BEFORE: MARTIN, Chief Judge, COOPER and HOWARD, Judges.
COOPER, Judge. The appellants were convicted in Jefferson Circuit Court on two counts of wanton endangerment and two counts of third degree criminal negligence.

The trial and conviction of the appellants arose out of an incident in the early morning hours in the West end of Louisville, Kentucky, on the 30th and 31st of March, 1976. On that date, Slim's Grill located at 421 South 19th Street, Club Cobra located at 38th and Broadway Streets, and Victory Liquors located at 2600 West Jefferson Street in Louisville were peppered by shotgun fire. Several automobiles parked on the streets in the adjacent areas were also peppered with the shot. A waitress in Slim's Grill

was severely injured with a wound in the head. She suffered brain damage and blindness to the extent of being mentally incompetent, and therefore was unable to testify at the appellants' trial.

The appellants were police officers for the Louisville Police Department and were off-duty during the night and early morning of March 30th and 31st, 1976. All were indicted in a twelve (12) count indictment.

The testimony of the various witnesses is lengthy and sometimes contradictory, but for the purpose of this opinion a statement of the basic facts will be given.

The appellants, Blair, Borders and Carpenter, left a meeting of the Fraternal Order of the Police at the Ramada Inn on Hurstborne Lane on March 30, 1976, between 8:30-9:00 p.m. and proceeded to the Willow Lake Inn in separate cars. They were accompanied by Richard Gary Dickenson, who testified at the appellants' trial. The four (4) police officers left the Willow Lake Inn in Sergeant Blair's car with Blair driving. Dickenson got out of the car at Watterson Expressway and Shelbyville Road after Blair refused to take Dickenson home. After dropping off Dickenson, the three proceeded to the Ramada Inn where Carpenter got his car and followed Borders and Blair to the Rooster Tail Bar on Chestnut Street in downtown Louisville. Sandra Stacey, a dancer at the Rooster Tail, identified the appellants at the Rooster Tail on March 30, 1976, at around 11:00-11:30 p.m. She sat at a table with them where they were having a drink. Following their drinks, the appellants all left together. Stacey testified that following her work and breakfast, she saw the appellant, Blair, at Gargotto's Liquor Store on Jefferson Street between 3:30-4:00 a.m. She told an investigating officer that she also saw the other two appellants, Borders and Carpenter, with Blair at the liquor store. At the trial however she stated that she only saw Blair at the liquor store during that time. Witnesses at Slim's Grill and the Club Cobra

identified the car from which the shootings came as a brown car that looked like an unmarked police car; consequently a teletype was put out for a brown car resembling a police car. Two spent 12-gauge shotgun shells were turned over to the Evidence Technician Unit after being found at the site of the shootings.

Sergeant Pete Giuchici testified that he investigated the shootings at the scene. As he proceeded in a westwardly direction away from the scene, after being advised by witnesses that they heard shots coming from that direction, he noticed a car coming toward him without headlights. Upon stopping the car, which was of a brown color, a voice came from within the car stating, "What's up, Pete?" By voice, Giuchici identified the speaker as appellant, Blair, and stated that there were two other white males in the car, and a 12-gauge shotgun was in the front end of the car. He could not identify the other two individuals. At the trial, Giuchici hedged as to the positive identity of Blair's voice.

A Harrison-Gilroy test for gunpowder residue was performed on Blair's car to determine whether shots had been fired from the automobile. Tests at the Kentucky State Police Crime Laboratory indicated that an unfired shotgun shell found at the Club Cobra had markings similar to the markings on the shells tested in one of Blair's guns.

We believe that the sole issue of merit before the Court is:

WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANTS?

It is a sound principle of law that a conviction may be sustained on circumstantial evidence. *Rogers* v. *Commonwealth,* Ky., 444 S. W. 2d 548 (1969); *Moore* v. *Commonwealth,* Ky., 446 S. W. 2d 217 (1969). The question then is whether the totality of the evidence was of such a nature that the judge could have concluded that reasonable minds

might fairly find guilt beyond a reasonable doubt. *Carmen* v. *Commonwealth,* Ky., 490 S. W. 2d 744 (1973); *Hodges* v. *Commonwealth,* Ky., 473 S. W. 2d 811 (1971). After a review of the evidence, we cannot say that the evidence is of such a nature and sufficiency to sustain the verdict of the jury.

The crux of the incriminating evidence submitted by the Commonwealth in this case revolves around the evidence that the defendants had recently fired a gun, notwithstanding the evidence that they were in the locality of the time it occurred.

The Commonwealth introduced evidence through an expert witness from the Kentucky State Police Laboratory who performed a Harrison-Gilroy test on the defendant Blair's car to determine whether or not a gun had recently been fired from the car. The purpose of the test is to find evidence of lead and barium which are two principal ingredients of gunpowder. The expert witness who performed the Harrison-Gilroy test testified that standard procedures for this test are as follows: Swabs of the area to be tested are saturated with hydrochloric acid and allowed to dry. Those swabs are sprayed with tartaric acid; then the swabs are sprayed with sodium rhodizonate. If lead is present it reacts with a red color and barium, if present, reacts with an orange color. Hydrochloric acid is again sprayed on the area. Lead then reacts with a blue color and the barium will turn to pink or red. The expert further testified that he had performed over 3,300 Harrison-Gilroy tests. The results of the tests in the present case revealed traces of lead, but no barium.

The admissibility of the Harrison-Gilroy test for discovering gunpowder residue is apparently not well established in Kentucky law. However, in this case, where this scientific test of recognized validity was performed competently under laboratory conditions, we cannot say that

the lower court abused its discretion in admitting the results of the test into evidence. *State* v. *Ross,* Mo., 523 S.W. 2d 841 (1975); *Commonwealth* v. *Sousa,* Mass., 215 N. E. 2d 910 (1966). The test for gunpowder residue in this case, however, was inconclusive at best. The absence of barium in the swabs taken from the defendant Blair's car leaves the jury with only an opportunity to speculate that a gun was actually fired from the defendant Blair's car.

Combined with more conclusive evidence, the Harrison-Gilroy test in question would not be determinative. Here, however, where all the evidence is circumstantial, the lack of conclusiveness of the test leaves the Court with no alternative but to reverse and remand to the lower court on grounds of insufficient evidence, and order that a new trial be granted with directions that if the evidence for the Commonwealth is substantially the same that a directed verdict in favor of the defendants be entered.

ALL CONCUR.

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APPENDIX B

OPINION RENDERED: FEBRUARY 10, 1978
ORIGINAL OPINION WITHDRAWN
AND REISSUED: JUNE 30, 1978
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

CA-568-MR

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From the Jefferson Circuit Court
Honorable Charles Leibson, Special Judge
Action No. 156577

REVERSING

BEFORE: MARTIN, Chief Judge, COOPER and HOWARD, Judges.
COOPER, Judge. The appellants were convicted in Jefferson Circuit Court on two counts of wanton endangerment and two counts of third degree criminal negligence.

The trial and conviction of the appellants arose out of an incident in the early morning hours in the West End of Louisville, Kentucky, on the 30th and 31st of March, 1976. On that date, Slim's Grill located at 421 South 19th Street, Club Cobra located at 38th and Broadway Streets, and Victory Liquors located at 2600 West Jefferson Street in Louisville were peppered by shotgun fire. Several automobiles parked on the streets in the adjacent areas were

also peppered with the shot. A waitress in Slim's Grill was severely injured with a wound in the head. She suffered brain damage and blindness to the extent of being mentally incompetent and, therefore, was unable to testify at the appellants' trial.

The appellants were police officers for the Louisville Police Department and were off-duty during the night and early morning of March 30th and 31st, 1976. All were indicted in a twelve (12) count indictment.

The testimony of the various witnesses is lengthy and sometimes contradictory, but for the purpose of this opinion a statement of the basic facts will be given.

The appellants, Blair, Borders and Carpenter, left a meeting of the Fraternal Order of the Police at the Ramada Inn on Hurstbourne Lane on March 30, 1976, between 8:30-9:00 P.M. and proceeded, in separate cars, to the Willow Lake Inn. They were accompanied by Richard Gary Dickenson, who testified at the appellants' trial. The four (4) police officers left the Willow Lake Inn in Sergeant Blair's car with Blair driving. Dickenson got out of the car at Watterson Expressway and Shelbyville Road after Blair refused to take Dickenson home. After dropping off Dickenson, the three proceeded to the Ramada Inn where Carpenter got his car and followed Borders and Blair to the Rooster Tail Bar on Chestnut Street in downtown Louisville. Sandra Stacey, a dancer at the Rooster Tail, identified the appellants at the Rooster Tail on March 30, 1976, at around 11:00-11:30 P.M. She sat at a table with them where they were having a drink. Following their drinks, the appellants all left together. Stacey testified that following her work and breakfast, she saw the appellant Blair at Gargotto's Liquor Store on Jefferson Street between 3:30-4:00 A.M. She told an investigating officer that she also saw the other two appellants, Borders

and Carpenter, with Blair at the liquor store. At the trial, however, she stated that she only saw Blair at the liquor store during that time. Witnesses at Slim's Grill and the Club Cobra identified the car from which the shootings came as a brown car that looked like an unmarked police car; consequently a teletype was put out for a brown car resembling a police car. Two spent 12-gauge shotgun shells were turned over to the Evidence Technician Unit after being found at the site of the shootings.

Sergeant Pete Giuchici testified that he investigated the shootings at the scene. As he proceeded in a westwardly direction away from the scene, after being advised by witnesses that they heard shots coming from that direction, he noticed a car coming toward him without headlights. Upon stopping the car, which was of a brown color, a voice came from within the car stating, "What's up, Pete?" By voice, Giuchici identified the speaker as appellant Blair, and stated that there were two other white males in the car, and a 12-gauge shotgun was in the front end of the car. He could not identify the other two individuals. At the trial, Giuchici hedged as to the positive identity of Blair's voice.

A Harrison-Gilroy test for gunpowder residue was performed on Blair's car to determine whether shots had been fired from the automobile. Tests at the Kentucky State Police Crime Laboratory indicated that an unfired shotgun shell found at the Club Cobra had markings similar to the markings on the shells tested in one of Blair's guns.

We believe that the two issues before us are the sufficiency of the evidence and the admission of the results of the Harrison-Gilroy test.

WAS THERE SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT?

It is a sound principle of law that a conviction may be sustained on circumstantial evidence. *Rogers* v. *Common-*

wealth, Ky., 446 S. W. 2d 217 (1969). The question then is whether the totality of the evidence was of such a nature that the judge could have concluded that reasonable minds might fairly find guilt beyond a reasonable doubt. *Carmen* v. *Commonwealth,* Ky., 490 S. W. 2d 744 (1973); *Hodges* v. *Commonwealth,* Ky., 473 S. W. 2d 811 (1971). After a review of the evidence, we cannot say that the evidence is of such a nature and sufficiency to sustain the verdict of the jury.

The crux of the incriminating evidence submitted by the Commonwealth in this case revolves around the evidence that the defendants were in the locality where the offense occurred and that a gun was recently fired in the car.

HARRISON-GILROY TEST RESULTS

The Commonwealth introduced evidence through an expert witness from the Kentucky State Police Laboratory who performed a Harrison-Gilroy test on the defendant Blair's car to determine whether or not a gun had recently been fired from the car. The purpose of the test is to find evidence of lead and barium which are two principal ingredients of gunpowder. The expert witness who performed the Harison-Gilroy test testified that standard procedures for this test are as follows: Swabs of the area to be tested are saturated with hydrochloric acid and allowed to dry. Those swabs are sprayed with tartaric acid; then the swabs are sprayed with sodium rhodizonate. If lead is present, it reacts with a red color and barium, if present, reacts with an orange color. Hydrochloric acid is again sprayed on the area. Lead then reacts with a blue color, and the barium will turn to pink or red. The expert further testified that he had performed over 3,300 Harrison-Gilroy tests. The tesults of the tests in tre present case revealed traces of lead, but no barium.

The admissibility of the Harrison-Gilroy test for discovering gunpowder residue is apparently not well established in Kentucky law. If, however, as was not true in this case, a scientific test of recognized validity was performed competently under laboratory conditions, we cannot say that it was a lower court abuse of discretion to admit the results of the tests into evidence. *State* v. *Ross,* Mo., 523 S. W. 2d 841 (1975); *Commonwealth* v. *Sousa,* Mass., 215 N. E. 2d 910 (1966). The test for gunpowder residue in this case, however, was inconclusive at best. The absence of barium in the swabs taken from the defendant Blair's car leaves the jury with only an opportunity to speculate that a gun was actually fired from the defendant Blair's car.

Combined with more conclusive evidence, the Harrison-Gilroy test could be determinative. Here, however, where all the evidence is circumstantial, the lack of conclusiveness of the test leaves the court with no alternative but to reverse the conviction of these appellants.

The judgment of the circuit court is reversed.

MARTIN, CHIEF JUDGE, CONCURS BY SEPARATE OPINION.

HOWARD, JUDGE, DISSENTS BY SEPARATE OPINION.

MARTIN, CHIEF JUDGE, CONCURRING. I fully concurred with the conclusion of this panel when our original opinion was issued on February 10, 1978. However, in the Commonwealth's petition for rehearing, a new issue has been raised. The purpose of this concurrence is to explain my position in regard to this argument and to answer the dissenting opinion of my associate judge.

The Commonwealth argues in their petition for rehearing that the panel overlooked the decision in *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977), and *Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977). I do not believe that the panel overlooked either of these decisions.

It is my opinion that either of these decisions is applicable to the present case. The decisions in these cases require that a motion for a judgment of acquittal must be made at the conclusion of all the proof in order for the appellate court to review the sufficiency of the evidence on appeal. In the present case, the record indicates that the defense attorneys did not make a motion for a directed verdict at the conclusion of all the proof. They did test the sufficiency of the evidence in a motion for a new trial.

The argument of the Commonwealth is that under *Kimbrough* and *Long* we are foreclosed from the consideration of the issue of the sufficiency of the evidence as to the guilt of these appellants. I do not believe these decisions were intended to be held retroactively. The decisions in both of these cases were issued after the trial in the present case. As was held in *Pendleton* v. *Pendleton,* Ky., 560 S. W. 2d 538 (1978), retroactivity will not be applied except when a specific dispositive issue was in litigation at the time of the controlling decision.

Furthermore, *Kimbrough* represents a clear departure from prior law in this Commonwealth. Proviously, a question of sufficiency of evidence could have been preserved either by a motion for directed verdict at the close of the Commonwealth's case, or at the close of all the evidence, or even in a motion for a new trial. *See Crain* v. *Commonwealth,* Ky., 484 S. W. 2d 839, 842 (1972); Civil Rule 61.02, made applicable to criminal cases pursuant to Criminal Rule 13.04; *Stone* v. *Commonwealth,* Ky., 456 S. W. 2d 43, 44 (1970).

Inasmuch as *Kimbrough* marks a clear departure from prior law and since appellant could not have had notice of the change, it would be fundamentally unfair to apply this newly created preservation of error rule to the facts and circumstances of this case. Since this procedural change would significantly affect appellant's substantial rights, it

"operates precisely like an *ex post facto* law, such as Art. I §10 of the [federal] Constitution forbids." *Bouie* v. *City of Columbia,* 378 U. S. 347, 353, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). *See also:* Kentucky Constitution, §19.

While I agree that on the sufficiency of evidence issue a motion for a judgment of acquittal at the conclusion of all the evidence would seem to be appropriate, I think that this is a very technical approach to the law. *Kimbrough,* in my opinion, does not supersede principles of due process and certainly in the present case, based on our earlier opinion, it would create a technical deficiency only, rather than a substantive issue. In the present case, certainly the error is the failure of the Commonwealth to prove beyond a reasonable doubt that these appellants committed the offense with which they were charged. The duty of an appellate court to insure that the appellants receive a fair trial cannot be foreclosed by a mere technicality.

It may be that the controlling authorities in this case would be those decisions, such as *Vachon* v. *New Hampshire,* 414 U. S. 481 (1974), in which the United States Supreme Court stated:

> It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Id.,* 414 U. S. at 480.

In the present case, the record would appear to lack any relevant evidence to prove the defendants' presence at the scene of the offense.

HOWARD, JUDGE, DISSENTING. I respectfully dissent from the majority in this case. In the first place, the majority opinion should have dealt with the recent case of *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977). The Supreme Court held therein that a motion for directed verdict made only at the close of the Commonwealth's evi-

dence and not renewed at the conclusion of all the evidence does not preserve for review the question of the sufficiency of the evidence to convict. This holding was followed by the Supreme Court in the case of *Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977). In the case at bar, in the *Kimbrough* case, and in the *Long* case, motions for directed verdict were made at the conclusion of the Commonwealth's evidence and in the case at bar the motions were sustained as to several counts of the indictments. However, in all three of these cases no motions were made at the conclusion of all the evidence and, therefore, the alleged errors were not preserved for review on appeal. In *Kimbrough* and *Long* the convictions were affirmed, and I think we should do likewise in this case.

In addition, there was sufficient evidence to convict, in my opinion, even in the absence of the evidence in regard to the Harrison-Gilroy test. In view of the fact that it was admitted that shots had been fired from Blair's car on a hunting trip, it does not appear that the test would be too important anyway. It was for the jury to determine the reason guns were fired from Blair's car.

There was, of course, conflicting evidence with some of the Commonwealth's witnesses changing their testimony, but the evidence of their prior inconsistent statements was entitled to be submitted to the jury as substantive evidence. *Jett* v. *Commonwealth,* Ky., 436 S. W. 2d 788 (1960).

If, under the evidence as a whole, it would not be clearly unreasonable for the jury to find the defendants guilty, they are not entitled to a directed verdict of acquittal even if the motions had been properly made. *Trowel* v. *Commonwealth,* Ky., 550 S. W. 2d 530 (1977). There was sufficient evidence of probative value to sustain the convictions.

I would affirm the judgment of the lower court.

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APPENDIX C

RENDERED: JUNE 12, 1979

SUPREME COURT OF KENTUCKY

78-SC-365-DG

COMMONWEALTH OF KENTUCKY - - - *Movant*

v.

JEROME BLAIR,
RICHARD CARPENTER, and
STEPHEN BORDERS - - - - - *Respondents*

On Review from the Court of Appeals
CA-568-MR
(Jefferson Circuit Court No. 156577)

MEMORANDUM OPINION PER CURIAM—AFFIRMING IN PART; REVERSING IN PART

This case involves an incident in the early morning hours of March 31, 1976, in which two establishments in Louisville's West End, Slim's Grill (19th and Cedar) and Club Cobra (38th and Broadway), were peppered with gunfire from a moving car. Lubertha Pugh, a waitress at Slim's Grill, was seriously injured by the gunfire, sustaining brain damage and blindness. Respondents Blair, Carpenter and Borders, three Louisville police officers, were found guilty of two counts of wanton endangerment and two counts of third-degree criminal mischief and sentenced to imprisonment for one year. The judgments of the Jefferson Circuit Court were reversed by a divided

panel of the Court of Appeals, which held that the evidence was not sufficient to support the convictions. We granted discretionary review.

We begin with a summary of the facts based upon our review of the record. Blair, Borders and Carpenter attended an FOP meeting at Ramada Inn (I-64 and Hurstbourne Lane) on the night of March 30. Accompanied by Officer Dickinson, respondents left the meeting about 8:30 and went to the Willow Lake Inn (La Grange Road near Anchorage), taking Blair's and Borders' cars. After about and hour the four left in Blair's car. Dickinson was dropped off at Shelbyville Road and Watterson Expressway around 11:00. Respondents then drove back to Ramada Inn, where Carpenter picked up his car and followed Blair and Borders downtown to the Rooster Tail (Chestnut Street). Sandra Stacy, a dancer at the Rooster Tail, saw the trio arrive between 11:00 and 11:30 and sat with them as they drank beer. Respondents left between 12:30 and 1:00 a.m.

The shooting at Slim's Grill occurred about 1:15; the Club Cobra shooting followed about 1:30. A police teletype was put out for a brown car resembling a police car that was seen leaving the scene at Club Cobra. Sgt. Pete Giuchici was investigating the Slim's Grill shooting when the Club Cobra call came on the radio. He headed west in the direction of Club Cobra and spotted a car traveling toward him with its headlights off. Giuchici stopped the oncoming car, and the front-seat passenger said, "What's up, Pete?" Giuchici identified the voice as that of respondent Blair. Giuchici also observed two unidentified white males and a shotgun in the car.

Betty Houchins, Blair's girl friend, told the grand jury that Blair told her he was stopped in the West End. At trial, however, she testified that Blair told her the police said he was stopped in the West End. In addition, Sgt. Browder, who investigated the case against respondents,

testified that Blair had mentioned in a conversation with him that he had a legitimate reason for being in the West End. Blair denied making the statement.

An expert who performed a Harrison-Gilroy test on Blair's car found traces of lead, but no barium or antimony. He testified that the results were consistent with the discharge of a firearm, close proximity of a firearm, or having held a firearm not recently cleaned. A number of police officers testified that they had shot groundhogs from Blair's car. Another expert expressed his opinion that a spent .12-gauge shotgun shell found near Club Cobra had been chambered in, but not fired from, a shotgun owned by Blair.

Sandra Stacy told investigating officers that she saw Blair at Gargotto's, a downtown (Second and Jefferson) liquor store on her way home from work between 3:30 and 4:00 and that he got into a dark car in which his two companions from the Rooster Tail were sitting. At trial, however, she testified that Blair was definitely alone when she saw him.

Borders testified that he left the Rooster Tail with Blair and went to the Fish Bowl (1700 Preston). They left between 1:00 and 1:30, and Blair drove him back to the Willow Lake Inn to get his car. During the investigation Borders told Sgt. Browder that he passed out in his car and never left the Willow Lake Inn. At trial Borders explained that he lied to Browder at the time because he didn't want his wife to know he had been at the Rooster Tail.

Blair testified that he left the Rooster Tail with Borders, went to the Fish Bowl, took Borders to the Willow Lake Inn, returned downtown to buy beer at Gargotto's, and went to Betty Houchins' apartment where he slept on the couch.

Carpenter testified that he went home after leaving the Rooster Tail. Officer Warman, who lived in the same apartment building as Carpenter, told the jury that he borrowed some records from Carpenter between 1:00 and 2:00.

The Commonwealth argues on this appeal that there was sufficient evidence to convict respondents, and that in any event the issue was waived by the failure of respondents to move for a directed verdict at the close of all the evidence, citing *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977).

The Supreme Court of the United States has held that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Vachon* v. *New Hampshire,* 414 U. S. 478, 480 (1974). We are of the opinion that the record before us contains no relevant evidence linking Carpenter and Borders to the charged offenses. It follows that their convictions amounted to a denial of constitutional rights which could not be waived under *Kimbrough.* The Court of Appeals correctly ruled that the evidence was insufficient to convict Carpenter and Borders.

The Court of Appeals erred, however, with respect to Blair. Blair was identified in the vicinity of the shootings shortly after they occurred in a car with its lights off which contained a shotgun. The record contains relevant evidence against Blair, and *Vachon* is therefore inapplicable. *Kimbrough* forecloses Blair from raising the sufficiency of the evidence before an appellate court.

That part of the opinion of the Court of Appeals reversing the convictions of Carpenter and Borders is affirmed. That part of the opinion dealing with Blair is reversed, thereby affirming the judgment of the Jefferson Circuit Court against him.

All concur.

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APPENDIX D

SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, - - - *Movant,*

v.

JEROME BLAIR,
RICHARD CARPENTER and
STEPHEN BORDERS, - - - - - *Respondents.*

OPINION

Nov. 20, 1979.
Rehearing Denied Feb. 12, 1980.

Defendants were convicted before the Jefferson Circuit Court on two counts of wanton endangerment and two counts of third-degree criminal mischief, and they appealed. The Court of Appeals reversed, holding that the evidence admitted at trial was insufficient to support the jury's verdict, and a petition for discretionary review was granted. The Supreme Court affirmed as to two respondents but reversed with respect to the third. Upon granting petitions for rehearing, the Supreme Court, Clayton, J., held that under the *Kimbrough* rule, defendants failed to preserve for appellate review the issue of sufficiency of the evidence where they failed to move for a directed verdict at the close of all the evidence.

Opinion of Court of Appeals reversed; judgments of conviction affirmed.

1. Criminal Law—Key 1044.1(7)

In order for the issue of the sufficiency of the evidence to be preserved for appellate review, the party wishing to use insufficiency as a basis for his appeal must have moved

for a directed verdict at the close of all the evidence, not just at the close of the Commonwealth's case-in-chief.

2. **Criminal Law—Key 1044.1(7)**

If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever been given an opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury.

3. **Criminal Law—Key 1044.1(7)**

Insufficiency of the evidence to support a verdict must be timely raised in the trial court, ordinarily by a motion for a directed verdict, in order for the question to be reviewable on appeal.

4. **Criminal Law—Key 1044.1(7)**

Under the *Kimbrough* rule, defendants failed to preserve for appellate review the issue of sufficiency of the evidence where they failed to move for a directed verdict at the close of all the evidence.

5. **Courts—Key 89**

Judicial consistency must be observed in order to maintain a responsible and efficient court system.

Robert F. Stephens, Atty. Gen., Martin Glazer, Asst. Atty. Gen., Frankfort, for movant.

John Tim McCall, Louisville, for respondent Blair.

Frank E. Haddad, Jr., Louisville, for respondent Carpenter.

Robert E. Fleming, Louisville, for respondent Borders.

CLAYTON, Justice.

Over three years ago, respondents, Blair, Carpenter and Borders, Louisville police officers at the time, were convicted of two counts of wanton endagerment and two counts of third-degree criminal mischief and sentenced to one year's imprisonment. The Court of Appeals reversed the

convictions, holding that the evidence admitted at trial was insufficient to support the jury's verdict. This court granted the Commonwealth's petition for discretionary review and in an opinion issued last June, affirmed the decision of the Court of Appeals as to respondents Carpenter and Borders but reversed that court's decision with respect to respondent Blair.

Petitions for rehearing were submitted by both sides and after careful consideration we now find it necessary to completely reverse the decision of the Court of Appeals and to uphold the judgments of the Jefferson Circuit Court.

[1–3] We rely substantially on two recent cases, *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) and *Rudolph* v. *Commonwealth,* Ky., 564 S. W. 2d 1, *cert. denied,* 439 U. S. 1004, 99 S. Ct. 616, 58 L. Ed. 2d 680 (1978). The procedural rule, as clarified in *Kimbrough,* is that in order for the issue of the sufficiency of the evidence to be preserved for appellate review, the party wishing to use the insufficiency as a basis for his appeal must have moved for a directed verdict at the close of all the evidence, not just at the close of the Commonwealth's case in chief. The rationale behind this rule being that: "If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever been given an opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury." *Kimbrough,* 550 S. W. 2d at 529. Furthermore, "[w]e have held consistently that insufficiency of the evidence to support a verdict must be timely raised in the trial court—ordinarily by a motion for a directed verdict . . . in order for the question to be reviewable on appeal. *Rudolph,* 564 S. W. 2d at 4. *See e. g., Long* v. *Commonwealth,* Ky., 559 S. W. 2d 482 (1977) and *Butler* v. *Commonwealth,* Ky., 560 S. W. 2d 814 (1977).

[4, 5] Since respondents failed to move for a directed verdict at the close of all the evidence, the *Kimbrough* rule must be applied as we perceive no reason to retract from this position. We must remain firm in our adherence to specified procedure because "an appellate hearing is conditioned upon compliance with essential rules, without which this Court could not effectively conduct its business. It is our duty to enforce those rules as a part of the judicial process . . . ." *United Mine Workers of America* v. *Morris,* Ky., 307 S. W. 2d 763, 766 (1957). Judicial consistency must be observed in order to maintain a responsible and efficient court system.

The opinion of the Court of Appeals is reversed, and the judgments of conviction for all three respondents are affirmed.

All concur.

APPENDIX E

OPINION RENDERED: NOVEMBER 20, 1979

SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

v.

JEROME BLAIR
RICHARD CARPENTER and
STEPHEN BORDERS

File No. 78-SC-365-DG

Appeal from Jefferson Circuit Court
Action No. 156577

MANDATE

The Court being sufficiently advised, it is therefore considered that the decision of the Court of Appeals is reversed, and the judgments of conviction for all three respondents are affirmed; which is ordered to be certified to said court.

February 12, 1980 Respondents' Petition for Rehearing Denied.

A Copy—Attest:
(s) Rose Tomlinson, D. C.
John C. Scott, Clerk

Issued 2/12/80